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In the Supreme Court of the United States

OCTOBER TERM, 1990

ELBERT L. HATCHETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
BRETT DIGNAM
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court properly limited the testimony of a witness in connection with petitioner's proffered defense of advice of counsel, in a case where the witness neither recommended that petitioner take the actions for which he was prosecuted nor advised petitioner that those actions were legal.

2. Whether it was permissible under now-repealed 18 U.S.C. 3651 (1982) to require petitioner, as a condition of his probation, to fulfill his legal obligation to pay his outstanding taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 918 F.2d 631. The opinion of the district court (Pet. App. 37-47) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1990. A petition for rehearing was denied on February 8, 1991. Pet. App. 48. The petition for a writ of certiorari was filed on April 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of failure to pay federal income taxes (for 1982, 1983, 1984, and 1986), in violation of 26 U.S.C. 7203. The court sentenced petitioner to three consecutive one-year sentences, a five-year term of probation, and a $100,000 fine. As a condition of his probation, petitioner was ordered to pay all his outstanding taxes. The court of appeals affirmed. Pet. App. 1-36.

1. Petitioner is a well-compensated attorney who for years has failed to keep up with his federal income tax obligations. The Internal Revenue Service determined in the late 1970s that petitioner owed back taxes of $107,454.14 for the years 1973-1977. In the summer of 1978, petitioner entered into an agreement with the IRS pursuant to which he would pay $750 per week—$500 for his 1978 estimated tax payments and $250 for his delinquent taxes. Pet. App. 2. After some of petitioner's checks to the IRS were dishonored, the IRS terminated the agreement at the end of 1978. *Id.* at 16.

During subsequent years, petitioner filed tax returns indicating a substantial amount of income and acknowledging the existence of substantial tax liabilities, but making little or no payment. Pet. App. 2. For example, during the five years from 1982 through 1986, petitioner filed returns indicating a total gross income of $2,910,199 (more than $580,000 a year) and acknowledging a tax liability of $1,007,615. During that period, however, he made only a single payment of $100,000 toward his tax liability. Moreover, only one of petitioner's returns during that period was filed in a timely manner: three were filed

one year late, and a fourth was filed two years late. *Id.* at 5-6. Petitioner was indicted on October 28, 1988.

2. At trial, petitioner contended that he did not have the intent required for the offense of failure to pay taxes, because he had relied on the advice of a long-time friend who was also an attorney. The friend and attorney, Franklin Gettelson, testified that he had spoken with petitioner in late 1979 or early 1980 about how petitioner should deal with his tax problems. Pet. App. 61-62. Gettelson testified that he had told petitioner at that time that "the best thing [petitioner] could do was to file the tax returns which were then due and to wait and pay the tax [when] he was able to resolve all of the problems he was having." *Id.* at 65. Gettelson added that he had advised petitioner that that course of action, although a "sound position," *id.* at 70, would subject him to penalties under the tax code: "I explained to him it would be expensive in terms of interest and penalties. I further explained to him that the interest would be deductible when he paid it and there would be some relief in that regard but that it would cost substantially, substantially more to defer the payment." *Id.* at 66. On cross-examination, Gettelson clarified that he had not advised petitioner to withhold payment of taxes or estimated tax payments during the years for which petitioner was indicted. *Id.* at 43.[1]

At one point in Gettleson's testimony, petitioner's counsel asked what petitioner had told Gettelson in the course of their 1979 or 1980 discussions. The

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[1] The portion of Gettleson's testimony that is not included in the appendix to the petition is set forth as an appendix to this brief.

prosecutor objected on grounds of hearsay and relevance. Pet. App. 62. The prosecutor pointed out that the conversation in question occurred in 1979 or 1980, and the indictment charged tax violations beginning in 1983. She contended that a proper foundation had not been laid for the evidence in question because "it is too far removed from the time frame of the indictment for reliance on counsel at that time to be an appropriate predicate for the hearsay." *Id.* at 63.

Petitioner's counsel conceded at the outset that the testimony would be hearsay. She argued, however, that it was admissible because it was not being offered as evidence of the truth of the matters contained in petitioner's statements to Gettleson, but rather to show that petitioner had disclosed his tax situation to Gettleson. Counsel argued that the testimony should be admitted because adequate disclosure is an element of the advice-of-counsel defense on which petitioner was relying. Pet. App. 63-64.

The prosecutor responded that testimony about advice petitioner received in 1980 could not form the basis for a defense of advice of counsel with respect to a course of conduct beginning in 1983. She therefore renewed her objection to Gettleson's testimony on that ground. Pet. App. 64. The district court sustained the government's objection, subject to reconsideration if petitioner wished to submit further briefing on the point. *Id.* at 64-65.

3. After trial, petitioner renewed his challenge to the exclusion of the testimony, arguing that the decision of the district court conflicted with the Eleventh Circuit's decision in *United States* v. *Eisenstein*, 731 F.2d 1540 (1984). The district court rejected that argument for three reasons. Pet. App. 37-47.

First, the court observed that Gettleson's testimony, unlike the testimony in *Eisenstein*, was the only evidence offered to prove the disclosures. Pet. App. 40-42. The court noted that although Gettleson's testimony "may have been admissible for the limited purpose of showing [petitioner] made a disclosure, it was not admissible to prove the facts constituting the disclosure." *Id.* at 41. There was no evidence submitted at trial, the court explained, "to support the conclusion the disclosure to which attorney Gettleson was to testify was a disclosure of the relevant facts." *Ibid.* That element of the advice-of-counsel defense could be satisfied, the court concluded, only if the jury "had * * * considered as truthful the out-of-court statements which attorney Gettleson was asked to recite." *Id.* at 41-42. Because there was no evidence to provide the factual basis for the disclosure, the statements by Gettleson, unlike those in *Eisenstein*, "were necessarily offered not only to prove that disclosure was made, but also to prove the truth of the out-of-court statements" that petitioner sought to elicit from Gettleson. *Id.* at 42. Therefore, the court concluded, the testimony in question was inadmissible on hearsay grounds. The court added that its ruling on the admission of the statements might have been different if counsel had indicated that the factual basis underlying the disclosure would be provided through a different witness, or even if counsel had asked that the statements be admitted subject to a cautionary instruction limiting their use to showing that the disclosure was made. *Ibid.*

Second, the district court noted that it had excluded the evidence not only because it was hearsay, but also because it was irrelevant, and that petitioner had failed to show how the evidence was relevant. Pet.

App. 40, 47 n.3. The court explained that it had found the evidence irrelevant "because it called for testimony regarding the time period of 1979-1980, a period not relevant to the charges of willful non-payment of taxes commencing in 1982." *Id.* at 47 n.3.

Finally, the district court concluded that even if the exclusion of Gettleson's testimony about petitioner's disclosures was error, the error was harmless, because "there was absolutely no evidence to suggest Mr. Gettleson advised [petitioner] not to pay his taxes in the years in question." Pet. App. 42-43. Because Gettleson never specifically advised petitioner to follow the course of conduct he ultimately pursued, the court held that the advice-of-counsel defense would not have been available even if the testimony had been admitted. *Id.* at 43-44.

4. Petitioner raised numerous contentions on appeal, but only two are relevant to this petition: (1) his claim that the district court erred in excluding Gettleson's testimony; and (2) his claim that the district court did not have the authority to require him to pay back taxes as a condition of his probation. The court of appeals rejected both claims.

On the evidentiary point, the court of appeals rejected petitioner's argument for two reasons. First, it distinguished *Eisenstein* by noting that the facts to which the attorney wished to testify in *Eisenstein* were independently narrated to the jury by one of the defendants. Thus, in *Eisenstein* there was admissible evidence from which the jury could assess the credibility of the statements made to the lawyer. In this case, by contrast, no admissible evidence was offered to show that the disclosures made to Gettleson were true or that petitioner believed them to be true. Moreover, there was no suggestion from counsel that other

evidence would be forthcoming to provide a proper foundation for the admission of petitioner's out-of-court statements to Gettleson. Under these circumstances, the court of appeals held, the district court did not abuse its discretion by excluding the statements. Pet. App. 14-16.

The court further found that the exclusion of the evidence "could not have undermined the jury's ability to determine the strength of the advice of counsel defense." Pet. App. 16. After summarizing the testimony that petitioner was permitted to present, the court concluded that it "was sufficient for a jury to determine whether [petitioner] had made a full disclosure to Gettleson of all pertinent facts." *Id.* at 17. The court noted that the government had not argued to the jury that petitioner's advice-of-counsel defense should fail for lack of full disclosure, but rather that it should fail because the advice had not been sufficiently specific to justify the inference that petitioner had relied on that advice when he engaged in the conduct for which he was prosecuted. Accordingly, the court concluded, there was little or no risk that the exclusion of the evidence affected the verdict. *Ibid.*[2]

The court of appeals also rejected petitioner's argument that it was improper to order petitioner to pay back taxes as a condition of his probation. Pet. App. 28-30. The court acknowledged that 18 U.S.C. 3651 (1982) allowed a court to order restitution as a condition of probation only for the counts on which a

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[2] Judge Jones dissented on the evidentiary point, arguing that the decision conflicted with *Eisenstein* and that it was irrelevant that the matters to be related by Gettleson had not independently been established, because it was up to the jury to evaluate the truth of the disclosures. Pet. App. 30-33.

defendant had been convicted. It found that the district court's order requiring petitioner to pay all his back taxes was lawful, however, because it was not a restitutionary order; instead, the court held, the order was "no more than" a requirement that petitioner "comply with the law as a condition of probation." Pet. App. 29.[3]

ARGUMENT

1. Petitioner contends (Pet. 14-28) that the district court erred in excluding a portion of Gettleson's testimony that petitioner claims was essential to his advice-of-counsel defense. The exclusion of that evidence was not reversible error, for several reasons.

a. First, the district court was correct in excluding Gettleson's testimony about petitioner's disclosures on hearsay grounds. It is true, as the district court noted, that Gettleson's testimony regarding petitioner's disclosures to him might have been admissible if it were offered solely to show that the statements were made. As the district court pointed out, however, petitioner did not offer to have the jury instructed that the testimony could be used only for a nonhearsay purpose. Moreover, if the testimony had been limited to that purpose, the district court could properly have found it to be irrelevant.

Gettleson's testimony about petitioner's disclosures to him was relevant only to petitioner's advice-of-counsel defense. In order to raise that defense, peti-

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[3] Judge Jones also dissented on the probation issue, noting that other courts had held that it was impermissible to impose conditions on probation that required restitution for crimes other than those for which the defendant had been convicted. Pet. App. 33-36.

tioner had to show that his disclosures to Gettleson were accurate and complete, or at least that petitioner believed them to be so. See *Williamson* v. *United States*, 207 U.S. 425, 453 (1908) (approving an instruction that in order to be entitled to the advice-of-counsel defense, the client must "fully and honestly lay[] all the facts before his counsel"); E. Devitt & J. Blackmar, *Federal Jury Practice and Instructions* § 14.12 (3d ed. 1977) (standard instruction on advice-of-counsel defense requires the defendant to make "a full and accurate report to his attorney of all material facts of which he has the means of knowledge"). As to the accuracy of the disclosures and petitioner's belief in their accuracy, however, Gettleson's testimony was clearly hearsay. Because petitioner offered no other evidence from which the jury could assess the accuracy and completeness of petitioner's statements to Gettleson, the district court and the court of appeals correctly concluded that in effect Gettleson's testimony was being offered not only for the proper purpose of showing that the statements were made, but also for the improper purpose of proving the truth of those statements. See Pet. App. 15-16.

Petitioner overstates the breadth of the court of appeals' ruling on this point. The court did not suggest that testimony by an attorney regarding disclosures made to him by a defendant should always be excluded on hearsay grounds. To the contrary, the court quoted the district court's observation that if defense counsel had asked that the testimony be admitted with a limiting instruction, or had indicated that another witness would provide a foundation for the testimony about the disclosure, Gettleson's testimony might have been admitted. Pet. App. 15. The court of appeals held the evidence inadmissible only

because the court agreed with the district court that, under the circumstances of this case, "Gettleson's testimony was offered to prove the truth of [petitioner's] out-of-court disclosures, and in the absence of a proffer by [petitioner's] counsel of other evidence that could prove the truth of the disclosures, the court properly ruled that [petitioner's] declarations came within the definition of hearsay and were inadmissible." *Id.* at 15-16.[4]

The court of appeals' decision does not conflict with *United States* v. *Eisenstein*, 731 F.2d 1540 (11th

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[4] For that reason, petitioner is incorrect in his broad contention (Pet. 23) that the effect of the court of appeals' decision is "to void the advice of counsel defense *sub silentio*." The court of appeals did not hold that evidence regarding statements made to and advice obtained from a lawyer is admissible only if there is corroborating evidence in the record regarding the statements and advice. The court simply held that a particular out-of-court statement could be used only for non-hearsay purposes, and that it could be excluded if it was likely to be used for an impermissible purpose.

In this case, petitioner would be in a position to know whether his disclosures to Gettleson were accurate and complete, or at least whether he believed them to be so (and thus justifiably could rely on the advice he received). Therefore, petitioner could have testified, even without corroboration from Gettleson, about the disclosures he made to Gettleson (assuming the court had found that the disclosures overcame the prosecutor's relevance objection). Petitioner also might have been able to establish the accuracy of his disclosures to Gettleson through other admissible evidence—perhaps even through Gettleson's testimony, taken in conjunction with other evidence regarding the disclosures. Contrary to petitioner's suggestion, nothing in the decision of either court below would foreclose such a result. The district court and the court of appeals held only that, in the context in which Gettleson's evidence was offered, it was apparent that that evidence would be taken to vouch for the accuracy of petitioner's disclosures.

Cir. 1984), on which petitioner relies. In *Eisenstein*, the defendant who sought legal advice testified personally about his statements to the attorney. 731 F.2d at 1546. It was therefore likely that the attorney's testimony would be used only for the proper, non-hearsay purpose of showing that the statements were made, and unlikely that the attorney's testimony would be used by the jury for the improper purpose of establishing the truth of the statements or the defendant's belief in their truth. In *Eisenstein*, then, unlike in this case, there was no significant risk that the attorney's testimony would be called upon to serve two distinct functions, one of which was illegitimate.

Petitioner argues (Pet. 25 n.15) that *Eisenstein* is not distinguishable from the present case on the ground cited by the district court and the court of appeals, because in *Eisenstein* neither defendant had testified before the attorney was called to testify. That fact does not undermine the distinction between this case and *Eisenstein*, however, because neither court in this case premised its ruling on the order of proof. Instead, the courts in this case based their analysis on the absence of any independent proof regarding the accuracy of the disclosures anywhere in the record, as well as the absence of any proffer by petitioner that such evidence would be forthcoming at any point in the trial. See Pet. App. 15, 42.[5]

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[5] Petitioner relies (Pet. 24) on several other cases that allegedly conflict with the decision of the court of appeals in this case. *United States* v. *McLennan*, 563 F.2d 943 (9th Cir. 1977), cert. denied, 435 U.S. 969 (1978), the only other court of appeals case cited, is clearly inapposite. In that case, the court held admissible the government's evidence that the lawyer had told the defendant that his proposed course of action was unlawful. That evidence was obviously admissible

b. Second, the district court properly excluded Gettleson's testimony about petitioner's disclosures to him because it was irrelevant. See Pet. App. 40, 47 n.3, 63-64. Nothing in Gettleson's testimony indicated that his advice was applicable to future years. Instead, the testimony suggested that petitioner spoke with Gettleson not to secure general advice for future tax problems, but to ascertain how to deal with his current liabilities. For example, Gettleson testified that the consultation in 1979 or 1980 related to taxes owed "at that time," *id.* at 62, and that the advice he rendered dealt with "the tax returns which were then due," *id.* at 65. As the government's cross-examination made clear, Gettleson never advised petitioner to take the specific actions for which he was prosecuted. App., *infra*, 1a-9a.[6] Therefore, even if the hearsay objection did not justify exclusion of Gettle-

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to rebut the defendant's advice-of-counsel defense, because the fact that the lawyer had given negative advice was highly relevant to the claim of good faith reliance on advice of counsel, regardless of whether the advice was correct. The three state court cases on which petitioner relies likewise do not address the issue presented here. In two of them, *Salmen* v. *Kamberos*, 206 Ill. App. 3d 686, 565 N.E.2d 6 (1990), and *Tate* v. *Connel*, 3 Ariz. App. 534, 416 P.2d 215 (1979), the defendant testified, so those cases are subject to distinction on the same ground as *Eisenstein*. In the third case, *Morin* v. *Moreau*, 112 Me. 471, 92 A. 527 (1914), the testimony at issue was the defendant's testimony, so again there was no risk that the jury would use evidence from an attorney for hearsay purposes.

[6] See *Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir. 1961) (noting that "advice of counsel is no defense in a situation in which the accused is generally advised by counsel but counsel is not shown to have advised the specific course of action with which the accused is charged"), cert. denied, 370 U.S. 952 (1962); *United States* v. *McLennan*, 563 F.2d at 946.

son's testimony, the district court properly excluded the testimony for lack of relevance.

c. Third, it is clear from the record that the testimony introduced in this trial would have been inadequate to make out a defense of advice of counsel, even if the advice had been contemporaneous with petitioner's conduct. Reliance on the advice of counsel is material to specific intent crimes because it may vitiate the willfulness that is an element of such crimes.[7] The advice-of-counsel defense rests on the common-sense notion that a factfinder reasonably may doubt that the government has proved a "voluntary, intentional violation of a known legal duty," *Cheek* v. *United States*, 111 S. Ct. 604, 610 (1991) (quoting *United States* v. *Bishop*, 412 U.S. 346, 360 (1973)), if the defendant's attorney, after full disclosure of the relevant facts, advised the defendant that the challenged course of action would be legal. That advice can create the sort of misunderstanding of the law that defeats the government's effort to prove actual knowledge of the legal duty in question, see

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[7] See, *e.g.*, Pet. 23; *United States* v. *Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (explaining that a "defense of good faith reliance upon * * * counsel is a critical circumstance that may be dispositive of the central issue of willfulness"); *Eisenstein*, 731 F.2d at 1543 ("A defendant * * * can attempt to negate proof of specific intent by establishing the defense of good faith reliance on advice of counsel."); *United States* v. *McLennan*, 563 F.2d 943, 946 (9th Cir. 1977) (agreeing with defendant's claim that good faith reliance upon the advice of counsel can negate fraudulent intent); see also *Williamson* v. *United States*, 207 U.S. 425, 453 (1908) (approving a jury instruction stating that someone "could not be convicted of crime which involves willful and unlawful intent" if he "in good faith and honestly follows [the] advice [of his counsel], relying upon it and believing it to be correct, and only intends that his acts shall be lawful").

Cheek, 111 S. Ct. at 610-611. Accordingly, for this defense to apply, the advice must be that the proposed course of action is legal.

Petitioner was convicted of failure to pay taxes. To make out an advice-of-counsel defense, he therefore needed to establish that his attorney advised him that failure to pay taxes did not violate any applicable legal rules. Gettleson's testimony, however, shows that he explicitly advised petitioner that his conduct was unlawful. See Pet. App. 66 ("I explained to him [that] it would be expensive in terms of interest and penalties."). The advice in this case, then, was *not* advice that a proposed course of action was legal; rather, it was advice that a proposed course of action was tactically preferable.[8] Advice of that sort is not likely to lead a criminal defendant to believe his conduct is lawful.[9] It is therefore inadequate to establish

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[8] See, *e.g.*, Pet. App. 71 ("I felt if [the IRS] reduced [its] claim to judgment a district judge would have to look reasonably on a payment plan."); *id.* at 72 (agreeing with the suggestion that "a judge would be more reasonable in affording an installment payment plan than the IRS").

[9] Gettleson's testimony can be read to suggest that Gettleson told petitioner that his proposed conduct, although subject to civil penalties, would not result in criminal prosecution. See Pet. App. 70. But even if Gettleson's testimony is read in that manner, it does not buttress petitioner's proposed advice-of-counsel defense, because it does not undermine the requisite intent to violate a known legal duty. In fact, by referring to the penalties petitioner would incur by failing to make timely tax payments, Gettleson was making clear to petitioner that he had a legal duty to pay his taxes on a timely basis, and that his proposed course of action would violate that duty. In specific intent crimes, the only knowledge the government must prove is that the act in question violates the law; it need not also prove knowledge that the act is criminal. See, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 425 n.9 (1985);

a valid advice-of-counsel defense. For that reason, the district court could properly have barred all of Gettleson's testimony going to the advice-of-counsel defense.

d. Finally, even if it was error for the district court to exclude the evidence at issue here, the error was harmless. As the court of appeals concluded, the exclusion of that portion of Gettleson's testimony "could not have undermined the jury's ability to determine the strength of the advice of counsel-defense." Pet. App. 16. Although Gettleson was not allowed to relate some of petitioner's statements to him, he repeatedly was allowed to testify about facts he knew as a result of his conversations with petitioner, thus allowing him to provide the jury a fair picture of the extent of petitioner's disclosures to him. For example, Gettleson testified that he knew the amount of taxes owed and how the deficiency had occurred, that petitioner had been audited, and that petitioner had made some payments. *Id.* at 16, 62. On the other hand, Gettleson acknowledged that he did not know that petitioner had been in an installment program, that the IRS had terminated because petitioner wrote bad checks or that petitioner was not then making current estimated tax payments. *Id.* at 16-17.

Moreover, the government did not argue to the jury that petitioner's defense should fail because of nondisclosure. Rather, the government's argument was that Gettleson's advice was not specific enough, with respect to the conduct charged in the indictment, to undermine the government's proof of willfulness. Pet. App. 17. For that reason, as the court of ap-

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United States v. *Freed*, 401 U.S. 601, 614-615 (1971) (Brennan, J., concurring).

peals explained, it was highly unlikely that the exclusion of petitioner's statements had any effect on the way the jury viewed the case. *Ibid.*

2. Petitioner devotes substantial attention (Pet. 14-23) to the argument that the district court's evidentiary ruling in this case denied petitioner his constitutional right to call witnesses and present a defense.[10] The short answer to that claim is that the Constitution does not trump ordinary applications of the rules of evidence and require that those rules give way whenever they impede a defendant's effort to present his case. See *Michigan* v. *Lucas*, No. 90-149 (May 20, 1991), slip op. 4; *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 & n.11 (1987); *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Washington* v. *Texas*, 388 U.S. 14, 23 n.21 (1967). Countervailing interests—most importantly, the integrity of the truth-finding process—justify applying rules of evidence to restrict the manner in which the defense presents its case, just as those rules restrict the manner in which the government may prove its case.

In this case, the district court applied familiar hearsay principles in a traditional fashion; the court simply sought to avoid the risk that the jury would make improper use of defense evidence that the government would not have a meaningful opportunity to

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[10] The court of appeals did not address petitioner's constitutional argument, which appears to have surfaced for the first time in petitioner's petition for rehearing before the court of appeals. Even there, petitioner devoted only one sentence to the argument and did not even cite an applicable constitutional provision. See Pet. App. 95 ("The denial of such a fundamental right [*i.e.*, the alleged abolition of the defense of advice of counsel] deprives the defendant of due process under the Fourteenth Amendment."). It therefore appears that petitioner has not properly preserved his constitutional claim for review.

challenge through cross-examination. Nothing in the district court's ruling prevented petitioner from seeking to show that he did not have the specific intent to violate the law. And, assuming petitioner could have shown that Gettleson's testimony was relevant, he presumably could have obtained its admission by offering admissible evidence as to the truth (or his belief in the truth) of the contents of the disclosures petitioner allegedly made to Gettleson. The district court's ruling that petitioner failed to satisfy that basic foundational requirement is not constitutionally suspect simply because the effect of that ruling was to bar the admission of evidence that was offered as part of petitioner's defense.

3. Petitioner also contends (Pet. 28-30) that the now-repealed version of the Federal Probation Act, 18 U.S.C. 3651 (1982), did not authorize the district court to impose as a condition of petitioner's probation a requirement that petitioner pay all his back taxes. Because Section 3651 has been repealed and does not apply to offenses committed after October 31, 1987, see Pub. L. No. 98-473, § 212(a)(1) and (2), 98 Stat. 2031, this issue is not of continuing importance and thus does not warrant review by this Court. In any event, the decision below is correct and its rationale does not conflict with the rationale of the decisions cited in the petition.

District courts imposing terms of probation under former Section 3651 enjoyed broad discretion in setting the conditions of probation. Section 3651 provided that the court "may * * * place the defendant on probation for such period and upon such terms and conditions as the court deems best." See *Burns* v. *United States*, 287 U.S. 216, 220-221 (1932) (noting that, "[t]o accomplish the purpose of the statute, an exceptional degree of flexibility in admin-

istration is essential"). The sentencing court's discretion was limited only by the requirement that the terms and conditions of probation bear a reasonable relationship to the rehabilitation of the accused, the protection of the public, deterrence of future misconduct by the probationer or others, warranted punishment, or some combination of those objectives. *United States* v. *Tonry*, 605 F.2d 144, 148 (5th Cir. 1979).

A judge would not violate the terms of Section 3651 by imposing as a condition of probation a requirement that a defendant comply with the law. Cf. *Burns*, 287 U.S. at 218 (noting without criticism a condition requiring compliance with laws). The condition in this case—that petitioner comply with his legal obligation to pay federal income taxes—does nothing more, and in fact is less onerous than a general requirement of compliance with the law. Moreover, in light of petitioner's convictions for failure to pay taxes, this condition seems particularly fitting. Our tax system depends on the voluntary assessment and payment of taxes. Failure to pay taxes that are acknowledged to be due and owing undermines that system; if the government were forced to resort to litigation against every citizen, the system would fail. See Pet. App. 78-82 (letters by petitioner indicating that he would pay taxes only after litigation). A requirement that petitioner comply with his legal duty to pay the taxes he already owes is thus entirely legitimate. See *United States* v. *Schiff*, 876 F.2d 272, 275 (2d Cir. 1989) (upholding condition of probation requiring payment of "all legally required" income taxes); *United States* v. *Merritt*, 639 F.2d 254, 256 (5th Cir. 1981) (upholding a requirement that defendants pay taxes falling due during the probationary period).

Petitioner does not discuss the language of the statute or the broad construction the courts have given it. Instead, he notes that one paragraph of Section 3651 specifically authorized restitution as a condition of probation, and that this paragraph did not authorize the imposition of restitution for crimes for which a defendant had not been convicted. Accordingly, he argues, the order in this case violated Section 3651. Pet. 28-29. The flaw in this argument is that it focuses on only one provision of Section 3651. It fails to address the broad introductory language of Section 3651, which provides ample support for the order entered in this case.

This flaw also demonstrates why the rationale of the decision below does not conflict with the reasoning of the four circuit court decisions on which petitioner relies. To be sure, two of those cases, *United States* v. *Green*, 735 F.2d 1203, 1205 (9th Cir. 1984), and *United States* v. *McDonough*, 603 F.2d 19, 24 (7th Cir. 1979), reversed trial court orders conditioning probation on the payment of taxes due for years other than the years of conviction. Those courts, however, assumed that the orders were entered only under the restitution provision and did not consider whether the orders could have been upheld under the general language that introduced Section 3651. Thus, while there is a difference in outcome among the decided cases, there is no conflict in the rationale of the decisions, which addressed different issues under Section 3651.

The other two cases cited by petitioner are farther afield. One of them, *United States* v. *Johnson*, 700 F.2d 699 (11th Cir. 1983), is a nontax case that, like the *Green* and *McDonough* cases discussed above, stated that a court could not order restitution under Section 3651 for crimes for which the defendant had

not been convicted. The final case, *United States* v. *Taylor*, 305 F.2d 183 (4th Cir.), cert. denied, 371 U.S. 894 (1962), although somewhat ambiguous in its reasoning concluded only that a district judge could not deprive a defendant of his right to contest the amount of taxes he owed, agreeing that the defendant could be required to pay "all taxes and penalties * * * determined to be due and collectible." 305 F.2d at 188.[11] Accordingly, the decisions cited by petitioner reached results contrary to the result in this case only because they relied on a portion of Section 3651 other than the one relied on below. Because the result below is correct and does not conflict with the reasoning of any other court, and because Section 3651 does not apply to any offenses committed after October 31, 1987, this issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
BRETT DIGNAM
Attorneys

MAY 1991

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[11] Relying on *Taylor*, the court of appeals imposed a similar limitation on the order in this case. See Pet. App. 30.

* * * *

[138] A. No.

Q. Now, in 1979, '80, when you discussed Defendant's tax problems, did you know that he had made no estimated tax payments for calendar year 1979?

A. I did not—let's see, 1979? I did not really examine the returns and I don't know what the posture was with respect to the content. I knew what the liability—I knew that there was a liability. I knew the returns had not been filed. I wasn't consulted with with regard to the estimated returns.

Q. Did you advise him not to make any further estimated tax payments?

A. No. That question never arose.

Q. How long did you consult with him on this occasion in 1979 and 1980?

A. Our consultation was kind of on a recurring basis because I would periodically, when I would see him or talk to him, I would ask him how things were going. So it was kind of a continuing thing in terms of our discussions.

Q. Subsequent to 1979, 1980, did you advise Defendant not to file tax returns with payment or to file tax returns without payment?

A. After that period of time? I don't know if that question ever came up again. I don't know if that question specifically ever came up again.

Q. Did you advise him that he should never make anymore [139] estimated tax payments?

A. I don't think that question ever came up again. The question that I resolved at the time had to do with attempting to resolve everything at one time and that's the advice that I gave him.

Q. Back in 1979 and 1980, is that correct?

A. Yeah, that would be the time frame.

Q. After that time, when did you have your next formal discussion of Defendant's collection problems? 1979, 1980 we have this one discussion. When was your next formal discussion?

A. Probably when he called on the collection department summons.

Q. 1984 that was. Did you advise him not to pay estimated taxes for 1981?

A. That issue never arose.

Q. Did you advise him not to file the 1981 tax return—or to not pay any taxes with the 1981 tax returns?

A. I don't believe we discussed after 1979-'80, that particular—

Q. So you did not advise him to withhold payment of the 1980, '81, '82, or '83 taxes?

A. No. When I spoke to him in 1979-'80 I said file the tax returns until you are able to resolve all your problems and then pay it on whatever basis you can work with them.

[140] Q. Now, in 1984, how did Defendant contact you about this summons?

A. I believe by telephone.

Q. And you intended to go to the meeting, did you not?

A. Yes.

Q. He—

A. Well, we discussed going to the meeting and I couldn't go at the time that I was supposed to go.

Q. Were you paid in connection with this—

A. No.

Q. Did you know Defendant hadn't paid any tax for—

If I may check for a moment, Your Honor.

Did you know that Defendant hadn't made any payment on his income taxes since September of 1980 at that time?

MR. LUSTIG: I'm sorry, would you repeat the question?

Q. (By Ms. Murnane) At the time of the 1984 collection summons, did you know that Defendant Elbert Hatchett had made no payments on his income taxes since September of 1980?

A. I knew he owed a substantial amount of tax. I don't know whether he paid or had not, I presume that he had not.

Q. At that time, in 1984, were you paid to consult with Defendant about the collection summons?

A. No. I wouldn't have charged Elbert nor would Elbert ever [141] charge me. That wasn't the kind of relationship that we had.

Q. I believe you said that you never discussed the meeting after it occurred, is that correct?

A. The meeting with the IRS?

Q. Yes. Other than in general terms to resolve it at one time?

A. Basically that was the extent of it. As I recall, that's what it was.

Q. Did you advise Defendant that he should continue to not pay his taxes at that time?

A. I don't think that question came up at that time.

Q. When was the next time you and Defendant formally discussed his collection problem?

A. Formally?

Q. Yes.

A. I don't know if we ever really, formally, in the sense he asked me to do something specifically.

In general terms, we would just periodically discuss it.

Q. In the course of your other conversation as old friends and occasional business associates, is that fair to say, it would just come up in the course of general conversation?

A. Well, yes. I knew he was very concerned and I was very concerned and I wanted to see what the status was, see how he was doing with resolving the problem. So I guess, whenever we happened to discuss it, we discussed it. I can't tell you with [142] any specific date. It was frequent.

Q. Do you get referrals from Defendant?

A. Periodically we do business together. We have a case we're working on jointly right now.

Q. Isn't it true these referrals are worth quite a bit of money in your practice?

A. It depends on what the case is. I mean depends on what the circumstances may be. Sometimes we have cases that do and sometimes we don't. Right now we have one case ongoing.

Q. In your discussion of the penalties for nonfiling, that occurred only back in 1979 and 1980, too, didn't it?

A. 1979 and 1982?

Q. Or 1980. That discussion also occurred back in 1979 and 1980?

A. We discussed that then, yes.

Q. And that discussion did not come up again, did it?

A. I knew the penalties were excessive because I knew the amounts of money were extraordinary.

Q. But you did not again discuss with Defendant after the meeting in 1979, 1980 what the penalties for refusing to pay would be, did you?

A. Well, he knew, because he received assessments.

Q. Did you discuss them with him?

A. I don't know if he specifically asked me or I specifically told him. He knew they were extraordinary because we discussed [143] them.

Q. Did you discuss with him, did you advise him on the penalties at any time other than at that 1979, 1980 meeting?

A. I don't recall any specific conversation that dealt only with penalties because it got to the point where the discussion was with dollars as opposed to the components of the liability. At the time that I first told him, I told him, look, your penalties and interests are going to be extraordinary and he was aware of that or made aware of that.

Q. To the best of your recollection, that's the only time that came up?

A. With any specificity, yeah.

Q. Did you ever contact the Internal Revenue Service on Defendant's behalf?

A. No.

Q. So your knowledge of what offers Defendant claimed to have been made came entirely from him, isn't that correct?

A. Yes. I saw correspondence, I saw different things but those would have come from him, yes.

Q. When you advised Defendant back in 1979 and 1980 to file without paying in order to resolve the whole thing at one time, did you expect Defendant to also make current estimated tax payments and to pay the tax with the subsequent returns? Did you expect that to be part of the total settlement?

A. We didn't really discuss that.

[144] Q. You didn't ever tell Defendant that he didn't have to pay current taxes, did you?

A. When you say current taxes, you mean file estimated tax returns?

Q. This year's taxes, yes.

A. We never discussed this year's taxes.

MS. MURNANE: Let me have a moment, Your Honor.

Q. (By Ms. Murnane) Isn't it true the only time you ever really discussed the payment, the payment of taxes, current taxes, was back in that initial 1979, 1980 meeting?

A. That was—it was more formally then, I suppose, because he specifically asked me to inquire as to—or to investigate and I suppose that was the formal time that I did that. And there may have been other times. I know there were other times because we discussed it frequently.

Q. Did you ever advise Defendant not to pay estimated tax payments?

A. I don't think the question of estimated tax payments was ever posed.

Q. Did you advise him not to pay his 1981 tax returns?

MS. MOREY: Objection, asked and answered.

THE COURT: This is cross-examination. You may continue.

Q. (By Ms. Morey) Did you advise him not to pay his 1981 tax return?

[145] A. If you construe what we talked about in '79 and '80, I suppose that would have applied in his mind to subsequent years.

Q. No. I want to know if you told him, if you told him in 1981 not to file and pay those taxes or to file and not pay those taxes.

MS. MOREY: Objection, asked and answered. The witness has testified—

THE COURT: This is cross-examination and it hasn't been answered.

WITNESS: I don't think that question specifically arose.

THE COURT: That's not an answer. I want to hear an answer, yes or no.

Q. (By Ms. Murnane) Did you tell Defendant that he should file his 1981 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1982 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1983 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1984 tax return and not make payment with it?

[146] A. No.

Q. Did you tell him he should file his 1985 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1986 tax return and not make payment with it?

A. No.

Q. Isn't it true that the Internal Revenue Service routinely requires one to make estimated tax payments and file and pay one's current taxes before they enter into an installment agreement?

MS. MOREY: Objection, lack of foundation.

THE COURT: Ms. Murnane.

MS. MURNANE: It is cross-examination. The witness has expressed opinions on the reasonableness of the Internal Revenue Service's policies. One is entitled to know what he knows about the Internal Revenue's policies.

THE COURT: That's not what you asked him.

MS. MURNANE: It is one question in that line.

THE COURT: Just lay the foundation.

Q. (By Ms. Murnane) Mr. Gettleson, have you negotiated installment payment programs?

A. Various times, yes.

Q. Isn't it true they universally require estimated tax payments and current—that one be current with one's other [147] tax obligations?

A. Universally? I don't know if it's done universally, no.

Q. Have you executed any installment payment programs in which one was allowed to not make estimated tax payments or to not pay one's current taxes and still make estimated tax on delinquent liabilities?

A. Are you talking about in the time I've been practicing as an attorney and a CPA prior to that?

Q. Hm-mm.

A. I don't recall. Because I just don't recall.

Q. Isn't it true there aren't any circumstances in which one can make installment loan payments without having to be current in one's tax obligations?

A. I don't know that for a fact, no.

Q. Did Defendant ever tell you that that's what the IRS was requiring of him for an installment payment program?

A. No.

MS. MOREY: Objection. It calls for hearsay, the exact same type of testimony we tried to get in on direct which the Government objected to.

THE COURT: Ms. Murnane?

MS. MURNANE: Your Honor, that particular question—

THE COURT: You're asking him what the Defendant told him?

[148] MS. MURNANE: Yes.

THE COURT: You want him to answer that question?

MS. MOREY: We will withdraw that objection.

MS. MURNANE: I'll withdraw the question.

Q. (By Ms. Murnane) Did you know what terms the Internal Revenue Service was requiring on the installment loan agreement?

A. At what point?

Q. At any point.

A. No. I think the correspondence that I saw was primarily the correspondence from Mr. Hatchett to the Internal Revenue Service in which he was offering to solve any liability.

Q. So the answer is you didn't know what the Internal Revenue Service was asking in connection with an installment payment plan, did you?

A. I never saw any specific document that would have told me that, no.

MS. MURNANE: No further questions, Your Honor.

THE COURT: Mr. Lustig?

MR. LUSTIG: I have no questions, Your Honor.

THE COURT: Ms. Morey, do you have any redirect of this witness?

MS. MOREY: No redirect, Your Honor.

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